A case to withdraw the triple talaq Bill

The Prime Minister's lament to the outgoing Rajya Sabha MPs that they missed out on an opportunity to debate important issues such as the triple talaq Bill — the Muslim Women (Protection of Rights on Marriage) Bill, 2017 — due to disruptions is an indication that despite widespread public opinion against it, the Centre is inordinately keen on making it a law.

What defies comprehension is the refusal of the Central government to appreciate the legal point that no person can be jailed for an act that is not a crime. The Supreme Court, in *Shayara Bano v. Union Of India* (2017), had set aside the validity of instant talaq (talaq-e-biddat), thus rendering its pronouncement ineffective in dissolving a marriage. Yet this Bill makes the pronouncement punishable with a three-year imprisonment without realising that such an arbitrary exercise of legislative power is liable to be judicially reviewed and struck down for violating the principles of natural justice and rule of law.

Interest in the triple talaq Bill has also been sustained by the erroneous belief held by some women's organisations that the pronouncement of talaq-e-biddat could be brought under the definition of emotional abuse mentioned in Section 3 of the Protection of Women from Domestic Violence Act, 2005 (PWDVA).

This view is as legally untenable as the obsession to criminalise inconsequential words. The PWDVA brings "verbal and emotional abuse" under domestic violence and defines it as: "a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested."

After its invalidation by the apex court, instant talaq comes nowhere near this definition. It will constitute abuse only if it is accompanied by the forcible removal of the wife from the matrimonial home, or her abandonment. But the Bill criminalises talaq-e-biddat even if it is not followed by eviction or desertion of the wife.

And as per Section 31 of the PWDVA, a person who indulges in domestic violence to the prima facie satisfaction of the magistrate can ultimately be punished with imprisonment which may extend to one year, or with a maximum fine of 20,000, or with both if he violates the "protection order" issued by the magistrate under Section 18 of the Act.

A protection order is meant not only to prohibit the accused from committing any act of domestic violence, it can also stop him from entering the place of employment of the aggrieved person, or attempting to communicate with her in any form. In addition, the magistrate can also pass a "residence order" under Section 19 inter alia directing the accused to remove himself from the shared household and restraining him or any of his relatives from entering any portion of the shared household in which the aggrieved person resides.

Most importantly, Section 32 declares that a breach of the protection order is a cognisable and non-bailable offence which the magistrate may conclude to have been committed by the accused on the "sole testimony of the aggrieved person."

Indeed as per Section 4, "any person" who has reason to believe that an act of domestic violence has been, or is likely to be, committed can give information about it to the Protection Officer concerned. No liability, civil or criminal, shall be incurred by that person for giving the information in good faith.

It is astonishing that those who want talaq-e-biddat, which can no longer be used to threaten a wife into submission, to be declared an act of “domestic violence” fail to realise that innocent men could be forced to undergo the aforementioned humiliating punishments reserved for cognisable and non-bailable offences. Can any recommendation be more unjust and anti-therapeutic in nature?

But the most significant ground on which the triple talaq Bill fails the test of constitutionality is found in Article 21 which states that “no person shall be deprived of his life or personal liberty except according to procedure established by law.”

In *Maneka Gandhi v. Union of India* (1978), a seven-judge Constitution Bench ruled that fairness is implicit in the phrase “procedure established by law” and therefore, the procedure should be “fair, just and reasonable, not fanciful, oppressive or arbitrary”; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. The court also clarified that “law” means reasonable law, not any enacted piece.

Endorsing this view, the Supreme Court, in *Justice K.S. Puttaswamy v. Union of India* (2017), said that “a law which provides for a deprivation of life or personal liberty under Article 21 must lay down not just any procedure but a procedure which is fair, just and reasonable” and that “the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action but on the basis of its effect on the guarantees of freedom.”

Earlier, the same was emphasised in stronger words by Justice V. Krishna Iyer in *Sunil Batra v. Delhi Administration* (1978): “True our Constitution has no ‘due process’ clause or the VIII Amendment; but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Art. 14 and 19, and if inflicted with procedural unfairness, falls foul of Art. 21.”

Seen in the light of these categorical pronouncements, the procedure imposing penal imprisonment for talaq-e-biddat in the proposed Bill is not just unfair and unreasonable but is also, to paraphrase a view of the U.S. Supreme Court (quoted in *Law, Hermeneutics and Rhetoric* by Francis J. Mootz III), so totally without penological justification that it would result in the gratuitous infliction of suffering on a person for doing nothing more than utter words rendered harmless by the Supreme Court.

This unwarranted punitive deprivation of personal liberty also runs afoul of Article 19, especially clauses 19(1)d and 19(1)g which allow all citizens “to move freely throughout the territory of India” and “practise any profession, or to carry on any occupation, trade or business.” Thus, if a man is unjustifiably jailed under the proposed law even for a few weeks, he will be denied of these rights for that period, to say nothing about the dim prospects of securing a job after the stigmatising confinement.

Given these procedural and legal infirmities, the chances of the triple talaq Bill being judicially challenged when it becomes law are high. This apart, the Centre has completely ignored the fact that the passage of the Bill in the Lok Sabha has unwittingly pushed Muslim women towards the All India Muslim Personal Law Board if one were to go by the recent massive demonstrations against it across India.

The only way to remedy the situation is for the government to withdraw the Bill.

A. Faizur Rahman is an independent researcher and the secretary general of the Chennai-based Islamic Forum for the Promotion of Moderate Thought. Email:a.faizur.rahman@gmail.com

The India-Japan economic relationship remains underwhelming in relation to strategic ties

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